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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

8 WENDY TYZBIR,

9 Plaintiff,

10 vs.

11 NANCY A. BERRYHILL,
12 Acting Commissioner of Social Security,

13 Defendant.
14

3:17-cv-00494-MMD-WGC

ORDER

15 Before the court is Plaintiff's application to proceed in forma pauperis (ECF No. 1) and
16 complaint (ECF No. 1-2).

17 **I. APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

18 A person may be granted permission to proceed IFP if the person "submits an affidavit that
19 includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees
20 or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and
21 affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d
22 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to all actions filed IFP, not
23 just prisoner actions).

24 In addition, the Local Rules of Practice for the District of Nevada provide: "Any person who is
25 unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The
26 application must be made on the form provided by the court and must include a financial affidavit
27 disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

28 "[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some
particularity, definiteness and certainty.'" *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981) (quoting

1 *Jefferson v. United States*, 277 F.2d 723, 725 (9th Cir. 1960)). A litigant need not “be absolutely
2 destitute to enjoy the benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331,
3 339 (1948).

4 A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee; therefore,
5 the application is granted.

6 II. SCREENING

7 “The court shall dismiss the case at any time if the court determines that ... the action or appeal
8 (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks
9 monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B)(i)-(iii).
10 This provision applies to all actions filed IFP, whether or not the plaintiff is incarcerated. *See Lopez*, 203
11 F.3d at 1129; *see also Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001) (per curiam).

12 Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided
13 for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) tracks that language.
14 Thus, when reviewing the adequacy of a complaint under 28 U.S.C. § 1915(e)(2)(B)(ii), the court applies
15 the same standard as is applied under Rule 12(b)(6). *See Watison v. Carter*, 668 F.3d 1108, 1112 (9th
16 Cir. 2012) (“The standard for determining whether a plaintiff has failed to state a claim upon which relief
17 can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of Civil Procedure 12(b)(6)
18 standard for failure to state a claim.”). Review under 12(b)(6) is essentially a ruling on a question of law.
19 *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

20 In reviewing the complaint under this standard, the court must accept as true the allegations,
21 construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff’s
22 favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se
23 complaints are “held to less stringent standards than formal pleadings drafted by lawyers[.]” *Hughes v.*
24 *Rowe*, 449 U.S. 5, 9 (1980) (internal quotation marks and citation omitted).

25 A complaint must contain more than a “formulaic recitation of the elements of a cause of action,”
26 it must contain factual allegations sufficient to “raise a right to relief above the speculative level.” *Bell*
27 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain something more ...
28 than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.” *Id.*

1 (quoting 5 C. Wright & A. Miller, Federal Practice & Procedure § 1216, at 235-36 (3d ed. 2004)). At
2 a minimum, a plaintiff should state “enough facts to state a claim to relief that is plausible on its face.”
3 *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

4 A dismissal should not be without leave to amend unless it is clear from the face of the complaint
5 that the action is frivolous and could not be amended to state a federal claim, or the district court lacks
6 subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995);
7 *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

8 Plaintiff’s complaint names Nancy A. Berryhill, Acting Commissioner of Social Security, and
9 requests review of the Commissioner’s final decision. (ECF No. 1-2.)

10 Federal courts have sole jurisdiction to conduct judicial review of the Social Security
11 Administration’s determination in this regard. *See* 42 U.S.C. § 405(g). Upon a review of Plaintiff’s
12 complaint, it appears administrative remedies have been exhausted with the Social Security
13 Administration. Therefore, Plaintiff’s complaint shall proceed.

14 IV. CONCLUSION

15 (1) Plaintiff’s application to proceed IFP (ECF No. 1) is **GRANTED**. Plaintiff is permitted to
16 maintain this action without the necessity of prepayment of fees or costs or the giving of security
17 therefor. This order granting in forma pauperis status does not extend to the issuance of subpoenas at
18 government expense.

19 (2) The complaint shall **PROCEED**. The Clerk is instructed to **FILE** the complaint (ECF No.
20 1-2).

21 (3) The Clerk shall **SERVE** the Commissioner of the Social Security Administration by sending
22 a copy of the summons and complaint by certified mail to: (1) Office of the Regional Chief Counsel,
23 Region IX, Social Security Administration, 160 Spear St., Suite 899, San Francisco, CA 94105-1545;
24 and (2) the Attorney General of the United States, Department of Justice, 950 Pennsylvania Avenue,
25 N.W., Room 4400, Washington, D.C. 20530.

26 (4) The Clerk shall **ISSUE** a summons to the United States Attorney for the District of Nevada
27 and deliver the summons and a copy of the complaint to the U.S. Marshal for service to the U.S.
28 Attorney’s Office at 100 West Liberty Street, Suite 600, Reno, Nevada 89501.

1 (5) Henceforth, Plaintiff, or counsel, shall serve upon the defendant, or the defendant's attorney,
2 a copy of every pleading, motion or other document submitted for consideration by the court. Plaintiff
3 shall include with the original paper submitted for filing a certificate stating the date that a true and
4 correct copy of the document was mailed to defendant or defendant's counsel. The court may disregard
5 any paper received by a district judge, magistrate judge, or clerk which fails to include a certificate of
6 service.

7 **IT IS SO ORDERED.**

8 DATED: August 31, 2017.

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11 WILLIAM G. COBB
12 UNITED STATES MAGISTRATE JUDGE
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